...PREME COURT, U. S.

JUL 31 1970

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. 292

GRAIN HANDLING COMPANY, INC.,

Petitioner,

vs.

PETER HARTNETT, REISS STEAMSHIP COMPANY, and INTERNATIONAL MILLING COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinion Below

Respondent International respectfully opposes the Petition to review the opinion of the United States Court of Appeals for Second Circuit dated January 22, 1970. The opinion of the Court of Appeals is reported at 421 F. 2d 1011 and is reprinted in full in the appendix to Petitioner's brief.

Statement of Case

Respondent International has no basic quarrel with Petitioner's statement of the case set forth on pages 3-8 of the Petition except to point out that Plaintiff, Hartnett testified, *not* that he jumped down from the bulkhead ladder (Petitioner's brief, Page 4), but fell "like a ton of bricks" when he reached the end of the ship's bulkhead ladder (App. 95) and twice testified that he didn't know whether he broke his foot in the first or second fall (App. 95, 155).

Questions Presented

Petitioner presents but two basic questions for review by this Court, namely, whether a jury finding of negligence on the part of Petitioner's employee-plaintiff constitutes a breach of the warranty of workmanlike performance as a matter of law, and secondly, whether the lower Courts properly permitted the jury to assess the ultimate burden of damages equally between Petitioner and Respondent International on the basis of a specific finding of joint responsibility for Plaintiff's accident.

Reasons for Denying the Writ

I

Complaining of an "irrational result" and "arbitrariness" in the opinion of the Second Circuit, Petitioner would have this Court believe that the directed verdict in favor of Reiss and against Petitioner deprived Petitioner of a right to jury trial under the 7th Amendment.

The Seventh Amendment, while preserving the right to a jury determination of a factual question, prohibits only

re-examination of such a determination otherwise than according to the rules of the common law.

We submit that there has been no re-examination of the jury finding of negligence in Petitioner's employee Hartnett and that the District Court and Court of Appeals have only, and properly, made application of such finding to the situation before them.

Actually as the Second Circuit pointed out (Page 10a, appendix to Petitioner's brief) its action in the case and in *McLaughlin v. Trelleborgs*, 408 F. 2d 1334 (2nd Cir.) cert. denied 395 U. S. 946 (1969) was implementing, rather than disturbing a jury verdict, for the reason that in each case there had been a specific finding of negligence against the Plaintiff by the jury.

Once the finding of negligence on the part of Petitioner's employee Hartnett is accepted, there can be only one logical and rational result. Petitioner is, of course responsible for the negligence of any of its employees. There is no sound reason to make any distinction, as Petitioner suggests, on the grounds that negligence of the injured Plaintiff constitutes merely a disability whereas negligence of another employee would be treated as a breach of warranty.

The one per cent finding should not impair the firm application of the basic finding of negligence. For example it is axiomatic that in common law a finding of one per cent contributory negligence will bar a negligence litigant from recovery. Furthermore, Petitioner's present posture is a complete reversal of the position it took in the Court of Appeals where it devoted an entire section of its Brief to the proposition that the jury's finding was against the weight of the evidence and that its employee Hartnett was, in fact, guilty of a much higher degree of negligence.

The fact remains that the jury found deviation from proper conduct in a party for whom Petitioner is legally responsible. Petitioner must accept this liability. Under the *Trelleborg rule* such deviation is tantamount to a breach of one of the warranties owed by a stevedore to the ship. This Court had the opportunity to review the question in *Trelleborg* but declined to do so (395 U. S. 946). *Trelleborg* therefore, remained controlling law in the Second Circuit at least. Uniformity of Application and consistency of rule suggest that review of the same question a year later would seem inappropriate.

II

Petitioner seeks to reduce its ultimate liability in this case to twenty-five percent by challenging the fairness of the jury finding of joint responsibility and affirmance thereof by the Court of Appeals.

Without discussing the merits of Petitioner's presentation, it would seem that this question fails to meet any of the criteria for the granting of a writ under Rule 19. Certainly no constitutional question is presented, no question of state of territorial law is involved, and no conflict with any decision of this Court or any other Court of Appeals is presented. The problem appears to have relevance only between the Petitioner and Respondent International. Under the circumstances we think that the application should be denied consistent with the observation of Mr. Justice Frankfurter in *Rice v. Sioux City Cemetery*, 349 U. S. 70 (1955) where he said at Page 74:

> "A federal question raised by a Petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for

> the benefit of the particular litigants . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episatic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issue unless avoidance becomes evasion. . . ."

and of Mr. Justice Taft speaking in *Layne and Bowler Corp. v. Western Well Works, Inc.*, 261 U. S. 387, where he said at Page 393:

> ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal".

Conclusion

The judgment of the Second Circuit should not be reviewed by this Court.

Respectfully submitted,

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